No. 05-184

Supreme Court, U.S.
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In The
Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF LOUISE DOSWALD-BECK, GUY S. GOODWIN-GILL, FRITS KALSHOVEN, VAUGHAN LOWE, MARCO SASSÒLI AND THE CENTER FOR INTERNATIONAL HUMAN RIGHTS OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

[Commissions – Fair Trial Standards]

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INTEREST OF *AMICI CURIAE*[1]

Amici submit this brief in support of the appeal by petitioner Salim Ahmed Hamdan. They do so because of their commitment to respect for international humanitarian and human rights law, and their conviction that the military commission and procedures established for the trial of petitioner Hamdan violate those norms, and accordingly violate United States statutes interpreted in light of applicable international law.

Louise Doswald-Beck is a Professor of the Graduate Institute of International Studies and Director of the University Centre for International Humanitarian Law in Geneva, Switzerland. She was a legal adviser at the International Committee of the Red Cross from 1987 to 2001, and became Head of the Legal Division in 1998. She has written extensively on international humanitarian and human rights law, and played a major role in the negotiations leading to various international legal instruments.

Guy S. Goodwin-Gill is Senior Research Fellow, All Souls College, University of Oxford, where he was formerly Professor of International Refugee Law. He served as Legal Advisor in the Office of the United Nations High Commissioner for Refugees from 1976-1988. He founded the International Journal of Refugee Law and was Editor-in-Chief from 1989-2001.

Frits Kalshoven is Professor Emeritus of Public International Law and International Humanitarian Law at the University of Leiden, The Netherlands. He took part in the diplomatic conference on "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts" that negotiated the 1977 Protocols to the Geneva Conventions of 1949, and was Chairman of the

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

United Nations Commission of Experts to investigate war crimes committed in the former Yugoslavia. In 2002, he was awarded the Henry Dunant Medal of the International Red Cross and Red Crescent Movement for his continued effort toward improved knowledge of and respect for international humanitarian law.

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Marco Sassòli is Professor of International Law at the University of Geneva, Switzerland and Associate Professor at the University of Quebec in Montreal. He was recently elected President of the Governing Council of the University Centre for International Humanitarian Law in Geneva, Switzerland, and is a former Deputy Head of the International Committee of the Red Cross' Legal Division.

The Center for International Human Rights of Northwestern University School of Law in Chicago fosters the use of international law to promote human rights, democracy and the rule of law. The Center engages in education, research, technical assistance and advocacy in support of international human rights and humanitarian law.

SUMMARY OF ARGUMENT

The ruling below would permit trials by military commission, utilizing procedures that are *ad hoc*, obsolete and contrary to modern international norms for fair trial of persons captured in war. Reversal of that decision is vital to avoid dilution of hard-won international standards for due process of law.

Among fundamental fair trial standards established by international human rights and humanitarian law, but jeopardized by the ruling below, are norms requiring that courts be independent and impartial, that judicial procedures not discriminate against foreign nationals, and that accused persons be tried in their presence with access to the evidence against them. None of these basic international standards is met by the military commission procedures at issue here.

The court below would allow the challenged trial based on a statute authorizing the President to prescribe procedures for military commissions, 10 U.S.C. § 836. However, the court below failed to interpret that statute in light of the canon of construction that acts of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains . . . . " *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord., F. Hoffman-LaRoche Ltd. v. Empagran S.,A.*, 542 U.S. 155, 164 (2004).

10 U.S.C. § 836 can, and therefore must, be interpreted to require that military commission procedures comply with fair trial norms of international human rights and humanitarian law. So interpreted, the statute does not authorize the trial procedures at issue here, and no trial using such procedures should be allowed to proceed.

The court below also erred in reading a footnote in this Court's 1950 decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), as foreclosing judicial enforcement of the 1949 Geneva Convention regarding prisoners of war. The court ignored both the full text of *Eisentrager* and the most relevant differences between the 1929 Geneva Convention at issue in *Eisentrager* and the 1949 Convention at issue here. It ignored, as well, critical post-WWII developments in international law which confirm the judicial enforceability of the 1949 Geneva Conventions.

For these reasons, *amici* urge this Court to reverse the decision below.

ARGUMENT

I. The Military Commission Trial of Petitioner Hamdan Would Violate United States Obligations Under International Human Rights and Humanitarian Law.

A. Modern International Human Rights and Humanitarian Law Impose Extensive Fair Trial Obligations.

No person – citizen or alien – has been tried by the United States before a military commission since the immediate aftermath of WWII. During the intervening half century, international human rights and humanitarian law have evolved greatly, forging standards not in place when the U.S. last convened a military commission. Key among these standards are the international fair trial standards that are jeopardized by the ruling below.

Numerous international instruments now bind the international community in its professed commitment that every accused must be assured a fair trial. The International Covenant on Civil and Political Rights ("ICCPR") – a human rights treaty to which 154 nations, the United States among them, are parties[2] – contains numerous fair trial provisions.[3] Although the ICCPR permits "derogations" from certain rights in times of national emergency,[4] its fair trial norms are non-derogable: no derogation may be made which would violate "humanitarian law or peremptory

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[2] *See* Ratification Table, Office of the U.N. High Commissioner for Human Rights, *available at* http://www.ohchr.org/english/countries/ratification/index.htm (last visited Jan. 3, 2006).

[3] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1996), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976 [hereinafter ICCPR]. *See, e.g.*, arts. 2.1; 14.1; 14.3(d); 14.3(e); 14.5 and 26.

[4] *Id.* art. 4.

norms of international law, for instance . . . by deviating from fundamental principles of fair trial . . . ."[5]

The 1949 Geneva Convention III (prisoners of war) ("GC III"), to which the United States has long been a party,[6] likewise includes fair trial rights. Prisoners of war ("POWs") charged with crimes are expressly guaranteed an extensive series of rights.[7] In addition, article 102 of GC III guarantees POWs the right to be tried only by the same courts, under the same procedures, as used in cases against military personnel of the detaining power[8] (which in the U.S. means trial by court-martial). Fair trial guarantees are deemed so essential that "willfully depriving a prisoner of war of the rights of a fair and regular trial prescribed in this Convention" is deemed a "grave breach" of GC III, making the persons responsible subject to criminal punishment.[9]

Customary international law, as reflected in the "Fundamental Guarantees" of article 75 of the 1977 Geneva Protocol I ("Protocol I"),[10] largely parallels the ICCPR's fair trial safeguards.[11] These fundamental guarantees apply

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[5] U.N. H.R. Committee *General Comment No. 29: States of Emergency (Article 4)*, (Aug. 31, 2001), CCPR/C/21/Rev.1/Add.11, para. 11. *See also id.* at paras. 15-16. "General Comments" are issued by the Human Rights Committee ("HRC"), a body established by the ICCPR and "charged with implementing and interpreting the ICCPR . . . ." *United States v. Duarte-Acero*, 208 F.3d 1282, 1285 n.12 (11th Cir. 2000).

[6] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb.2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

[7] *See id.* arts. 99 and 103-07.

[8] *Id.* art. 102.

[9] *Id.* art. 130.

[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, entered into force, Dec. 7, 1978, reported in 16 I.L.M. 1391 (1977).

[11] Whereas ICCPR article 14, *supra* note 3, guarantees the right to a "fair and public hearing by a competent, independent and impartial

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to all persons within the power of a state participant in an armed conflict who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.[12] Thus, should this Court conclude that petitioner Hamdan is not entitled to the protections GC III accords POWs, he would nonetheless be protected by these "fundamental guarantees."

These fundamental guarantees have attained the stature of customary international law and thus bind the United States even though it has not ratified Protocol I. More than 160 states are parties to Protocol I.[13] The United States has taken the initial step of signing the treaty, its stated reasons for not ratifying do not include objections to article 75, and the State Department transmittal letter recognized that certain provisions of Protocol I reflect customary international law.[14] U.S. government legal experts and military manuals have identified article 75 as among those provisions that reflect customary international law.[15] Article 75 is consistent with the fair

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tribunal established by law," article 75.4 of Protocol I assures the right to trial before an "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . . ." It then lists essentially the same safeguards as in ICCPR articles 14.2 and 14.3.

[12] Protocol I, *supra* note 10, art. 75.1.

[13] *See* The International Committee of the Red Cross States Parties & Signatories Database, http://www.icrc.org/ihl.nsf/CONVPRES?Open View (last visited Jan. 3, 2006).

[14] *See Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, attaching State Dept. transmittal letter, 26 I.L.M. 561, 564 (1987).

[15] Meron, Theodor, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (Oxford Univ. Press 1989), citing Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81 ASIL Proc. 26, 37 (1987) (Lt. Col. B. Carnahan of the Joint Chiefs of Staff in personal capacity only); *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 Am.U.J. Int'l.L. & Pol'y 415, 427 (1987) (M. Matheson, Deputy Legal Adviser, U.S. Dept. of

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trial standards of widely ratified treaties on both human rights (*e.g.*, ICCPR article 14) and humanitarian law (*e.g.*, GC III). Leading commentators and the American Bar Association agree that article 75 reflects customary international law.[16]

B. Because the Statutes on Which the Government Relies as Authority for the Military Commission *Can* Be Construed in a Manner Consistent with U.S. Obligations Under International Law, They *Must* Be So Construed.

This Court can and should take account of international law, which has been part of United States law since the founding of the Republic. Under the Supremacy Clause, "all Treaties made" share with the Constitution and federal statutes the status of "supreme Law of the

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State); D. Scheffer, *Remarks*, 96 ASIL Proc. 404, 406 (2002) (Former Ambassador at Large for War Crimes Issues Scheffer stated that "we need to understand fully that article 75 of Protocol I is a very vibrant article that the United States government has actually said represents customary international law (even though we have not ratified Protocol I)"). Additionally, the 1997 edition of the U.S. Army, Judge Advocate General's School, International & Operational Law Department, *Operational Law Handbook*, at 18-2, stated expressly that the U.S. views article 75 of Protocol I as "customary international law." (*Available at* http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf, (last visited Jan. 3, 2006)). Although more recent editions do not repeat this statement, neither do they qualify or retract it.

[16] *E.g.*, George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 893 (2002); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 Duke J. Comp. & Int'l L. 185, 190 (1996); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 Military L. Rev. 40, 81-82 (2002); American Bar Association Recommendation 10-B, adopted by the ABA House of Delegates Aug. 9, 2004 ("customary international law, including article 75 of the 1977 Protocol I to the Geneva Conventions") *available at* http://www.abanet.org/humanrights/torture.pdf (last visited Jan. 3, 2006).

Land." U.S. Const. Art. VI, § 2. As the Supreme Court has recognized, "A treaty . . . is a law of the land as an act of congress is." *Edye v. Edye*, 112 U.S. 580, 598-99 (1884). *See also El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999), *quoting Zicherman v. Korean Airlines*, 516 U.S. 217, 226 (1996) ("a treaty ratified by the United States is . . . the law of this land").

International law bears on the domestic legal validity of petitioner Hamdan's military commission and its procedures because the applicable statutes can, and therefore must, be interpreted in accord with international law. As Chief Justice John Marshall declared in *Murray v. Schooner Charming Betsy*, "[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." 6 U.S. (2 Cranch) 64, 118 (1804). The *Charming Betsy* canon has been consistently reaffirmed by the Supreme Court. *E.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCullogh v. Sociedad Nacional de Marineros*, 372 U.S. 10, 20-21 (1963). It requires construction of acts of Congress, wherever possible, in a manner consistent with United States treaty obligations. *Sale v. Haitian Centers Council*, 509 U.S. 155, 178 and n. 35 (1993). The *Charming Betsy* canon also requires that construction of U.S. statutes be consistent, if possible, with customary international law. *F. Hoffman-La Roche Ltd.*, 542 U.S. at 164 (statutory construction reflecting "principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow"). Thus, even where the U.S. has not joined a treaty, the treaty must be taken into account in construing U.S. statutes if its applicable norms are widely accepted as customary international law.

The Presidential Order establishing military commissions, on which the subsequent military orders and instructions are based, purports to exercise authority conferred by three statutes, namely the Authorization for

Use of Force Joint Resolution,[17] and 10 U.S.C. §§ 821 and 836(a) (2004).[18] Nothing in these statutes purports to authorize or require military commission procedures in conflict with international law.[19] Thus the statutes may – and accordingly must – be interpreted to authorize only commissions and procedures consistent with United States obligations under treaties and customary international law.

The military commission trial of petitioner Hamdan would violate numerous critical fair trial norms which the United States is obliged to respect as a matter of international human rights and humanitarian law. Among such minimum standards are norms requiring that all criminal tribunals, including military commissions: (1) must be independent and impartial, (2) must not discriminate on the basis of nationality, and (3) must not deny the accused and his counsel access to trial proceedings and documents. The Hamdan military commission and its procedures violate each of these critical norms.[20]

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[17] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[18] *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (Presidential Military Order), 66 Fed.Reg. 57833 (Nov. 13, 2001), preambular paragraph.

[19] The Joint Resolution makes no express reference to military commissions. Section 821 states that the jurisdiction of courts-martial does not deprive military commissions of concurrent jurisdiction over offenders or offenses "that by statute or by the law of war may be tried by military commissions . . . ." Section 836(a) authorizes the President to prescribe procedures for military commissions, provided they do not violate the Uniform Code.

[20] The military commission and its procedures violate international law in additional respects which space limitations do not permit us to address. Among these are the requirement that any criminal tribunal be "established by law;" the right to promptness in notification of charges, access to counsel, appearance before a judge, and trial; and the prohibition on using as evidence statements obtained under torture or the duress of coercive conditions.

C. The Military Commission and Its Procedures Violate International Human Rights and Humanitarian Law Fair Trial Requirements.

1. The Military Commission Trying Petitioner Hamdan Is Not Independent and Impartial.

Article 14.1 of the ICCPR guarantees an accused the right to be tried by a tribunal that is "independent and impartial." This is "an absolute right that may suffer no exception."[21]

"Independence" refers to the freedom of tribunal members from external interference with their judicial functions, and to the "objectively justified" appearance of such independence.[22] "Impartiality" refers to the absence of subjective bias on their part, and to the objectively justified appearance of the absence of bias.[23] In assessing independence and impartiality, the U.N. Human Rights Committee ("HRC") looks "in particular . . . to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition[s] governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch . . . ."[24]

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[21] *González del Río v Peru*, U.N. H.R. Committee, Communication No.263/1987 (Oct. 28, 1992), para. 5.2.

[22] *E.g., Cooper v. U.K.* App. No. 00048843/99, Eur. Ct. H.R. (Dec. 16, 2003), para. 104 *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=3675449&skin=hudoc-en (last visited Jan. 3, 2006).

[23] *Id.*

[24] U.N. H.R. Committee *General Comment No. 13: Equality before the courts and the right to a fair trial and public hearing by an independent court established by law (Art. 14)* (Apr. 13, 1984), para. 3; *see also* U.N. Office of the High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, 26 Aug. to 6 Sept. 1985 and endorsed by General

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By any of these measures, the lack of independence of the military commission trying petitioner Hamdan is patent. Broad powers over the commission are exercised by the "Appointing Authority," a newly created executive office whose incumbent is appointed by, and serves at the pleasure of, the Secretary of Defense.[25] This Authority selects the members of each military commission and chooses one to be the presiding officer.[26] The only criteria provided for selection are that commission members must be U.S. military officers and "competent to perform the duties involved,"[27] and at least one must be a U.S. military lawyer.[28] The lack of sufficient criteria for selection and transparency in the selection process raises troublesome questions of potential unseen interference in the independence of the commissions. Nothing precludes the Authority from selecting members with a view to favoring the prosecution over the defense. This risk is aggravated by the entirely *ad hoc* nature of the appointments. A military officer may be appointed to sit on one commission, and then never be appointed to another, or the officer may be appointed repeatedly. The Authority's discretion to control the composition of commissions is wide and unchecked.

The same Authority has sole power to decide many critical questions normally ruled on by courts, further undermining any military commission claim to independence. The commissions are not allowed to decide any

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Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras. 1-6.

[25] Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, § 2 (Aug. 31, 2005) [hereinafter MCO No. 1]; *see also* Military Commission Order No. 5, *Designation of Appointing Authority*, (Mar. 15, 2004) (revoking designation of initial Appointing Authority and designating new Appointing Authority), http://www.dod.mil/news/Aug2004/commissions_orders.html (last visited Jan 3, 2006).

[26] *Id.* MCO No. 1, §§ 4(A)(1)-(4).

[27] *Id.* § 4(A)(3).

[28] *Id.* § 4(A)(4).

interlocutory question whose outcome might result in termination of the proceedings; instead, the presiding officer must refer all such questions to the Authority.[29] Likewise, a plea agreement between the defense and prosecution is subject to approval, not by the commission, but by the Authority.[30]

The Authority is similarly empowered to decide many other questions of trial procedure normally ruled on by courts, including any and all interlocutory questions the presiding officer may choose to refer.[31] The Authority may close the proceedings to the public and may even exclude the accused and his civilian defense counsel.[32] The Authority directs the time and place of each commission session,[33] conducts an "administrative review" of the record of trial and may return the case for further proceedings if deemed necessary,[34] and approves or disapproves any communications regarding military commissions by prosecutors or defense counsel to the news media.[35] Exercise of these normally judicial powers by an executive officer constitutes (and objectively appears to constitute) direct interference with the independence of the commissions.

In addition, all members of the military commissions are serving military officers,[36] a factor justifying doubt as

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[29] *Id.* § 4(A)(5)(e).

[30] *Id.* § 6(A)(4).

[31] *Id.* § 4(A)(5)(e).

[32] *Id.* § 6(B)(3).

[33] *Id.* § 6(B)(4).

[34] *Id.* § 6(H)(3).

[35] Military Commission Instruction No. 3, July 15, 2005, *Responsibilities of the Chief Prosecutor, Deputy Chief Prosecutor, Prosecutors, and Assistant Prosecutors*, § 5(c); Military Commission Instruction No. 4, *Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Counsel* (Sept. 16, 2005) § 5(c). Both *at* http://www.dod.mil/news/Aug2004/commissions_instructions.html (last visited Jan. 3, 2006).

[36] MCO No. 1, *supra* note 25, § 4(A)(3).

to their independence and impartiality.[37] They are subject to military performance evaluations,[38] and most have career aspirations within the military.[39] While the commissions are instructed to act "impartially,"[40] and officers' performance as commission members is not to be taken into account in their evaluations,[41] under international law these formal undertakings do not suffice to assure impartiality in fact or in appearance.[42]

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[37] *Cooper v. U.K.*, Eur. Ct. H.R., *supra* note 22, para. 117 (participation of civilians in key positions on British air force courts-martial found to be "one of the most significant guarantees of the independence of the court-martial proceedings"); *Incal v. Turkey*, App. No. 00022678/93, Eur. Ct. H.R. (June 9, 1998), para. 68 (independence and impartiality of Turkish National Security Courts were negated by fact that one of three members of these courts was a military judge, and such officers are "servicemen who still belong to the army, which in turn takes its orders from the executive." In addition, security courts' impartiality was open to doubt because they empowered members of one armed force to sit in judgment on their presumed enemies.); *Ocalan v. Turkey*, App. No. 00046221/99, Eur. Ct. H.R. (March 12, 2003), paras. 111-21 (even a single military judge on a three-judge tribunal, even for only a portion of the proceedings, tainted its impartiality and independence; among other factors, doubts were objectively justified by "the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities . . . .").

[38] Military Commission Instruction No. 6, *Reporting Relationships for Military Commission Personnel* (Apr. 15, 2004), § 3(A)(8). Commission members "continue to report to their parent commands." *Id.* 3(B)(10), *available at* http://www.dod.mil/news/Aug2004/commissions_instructions.html (last visited Jan. 3, 2006).

[39] MCO No. 1, *supra* note 25, § 4(A)(3) requires that commission members be military officers, although they may include retired officers recalled to active duty.

[40] MCO No. 1, *supra* note 25, § 6(B)(2).

[41] MCI No. 6, *supra* note 38, § 3(B)(10).

[42] *Findlay v. U.K.*, App. No. 00022107/93, Eur. Ct. H.R. (Feb. 25, 1997), paras. 35, 75, 80 (Court expressed doubts as to whether impartiality was objectively justified even though British court-martial members were sworn to act "without partiality"); *Incal v. Turkey*, Eur. Ct. H.R., note 37 *supra*, paras. 27, 67, 73 (Court expressed doubts about impartiality even though Turkish military judges on National Security

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These pervasive structural defects are aggravated by public statements by the Commander-in-Chief, characterizing the prisoners at Guantanamo as "bad men,"[43] and by the Secretary of Defense, asserting that "the people in U.S. custody are . . . enemy combatants and terrorists who are being detained for acts of war against our country."[44] To counter these widely publicized statements would require strong structural guarantees of independence and impartiality. Yet the commissions are burdened by the opposite: strong structural interferences with their independence and impartiality.

The structural defects also mean that the lack of independence and impartiality cannot be cured by the particular composition of a commission or by disqualification of individual members. Doubts about the independence and impartiality of the commission trying petitioner Hamdan are objectively justified by its structural deficiencies. The military commission thus fails the international tests of independence and impartiality.

Courts were constitutionally guaranteed to be independent and to judge "according to their personal conviction, in accordance" with the law); *Grieves v. U.K.*, App. No. 00057067/00, Eur. Ct. H.R. (Dec. 16, 2003), paras. 84, 85, 88, 91 (career aspirations of British navy court-martial members were among the factors objectively justifying doubts about their independence and impartiality; although British government argued that naval Judge Advocate was "not reported on as regards his performance" in courts-martial, the European Court of Human Rights was unimpressed); *Polay Campos v. Peru*, U.N. Doc. CCPR/C/61/D/577/1994, U.N. H.R. Comm. (Jan. 9, 1998), para. 8.8 (Peruvian anti-terrorism tribunals violated a "cardinal aspect of a fair trial . . . that the tribunal must be, and be seen to be, independent and impartial," because they could include "serving members of the armed forces").

[43] *E.g.*, N. Watt, *Bush Aids Blair By Halting Trial of Britons in Guantanamo Bay*, The Guardian (London), July 19, 2003, at 8.

[44] Remarks by Secretary of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce re: Prisoners being held at Guantanamo Bay, Miami, Fla., Feb. 13, 2004, *available at* www.defenselink.mil/transcripts/2004/tr20040213-0445.html (last visited Jan. 3, 2006).

The statutes referring to the jurisdiction of military commissions and authorizing the President to prescribe their procedures, 10 U.S.C. §§ 821 and 836(a), must be interpreted to contemplate only commissions which are independent and impartial. The commission trying petitioner Hamdan is neither.

2. The Military Commission Impermissibly Discriminates Against Non-U.S. Nationals.

Petitioner Hamdan is a citizen of Yemen. The President's Military Order authorizes trial by military commission of members of al Qaeda and other alleged international terrorists *only* if they are non-citizens of the U.S.[45] Thus, if a foreign national and an American both join al Qaeda, and both commit the same terrorist bombing, the foreign national can be tried by military commission, but the American cannot. The American would be entitled to trial either by a civil court with full judicial guarantees, or by a court-martial conducted in accordance with a whole panoply of fair trial rights set forth in the Uniform Code of Military Justice.[46]

This discrimination contravenes both international human rights and humanitarian law. ICCPR article 2.1 requires States Parties to recognize ICCPR rights "without distinction of any kind." Article 26 adds, "All person are equal before the law and are entitled without any discrimination to the equal protection of the law."[47] GC III as well as Protocol I are in accord.[48]

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[45] Presidential Military Order, *supra* note 18, § 2(a).

[46] Uniform Code of Military Justice, 10 U.S.C. §§ 831, 832, 839 and 846.

[47] Although a few ICCPR rights (such as the rights to residence within a country and to political participation) may be denied to non-citizens, "[t]he general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens." U.N. H.R. Committee *General Comment No. 15: The position of aliens under the Covenant*, (April 11 1986), para. 2.

[48] "[A]ll prisoners of war shall be treated alike . . . , without any adverse distinction based on . . . nationality . . . ." GC III, *supra* note 6,

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Not all differences in treatment are discriminatory. Distinctions may be upheld "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[49] The President's Military Order, however, articulates no justification, let alone a "reasonable and objective" basis, for discriminating against foreign nationals. It justifies trial by military commission in order to "protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks," and because of the "danger to the safety of the United States and the nature of international terrorism."[50] But it makes no effort to explain why these rationales apply to foreign but not to American international terrorists, and none is apparent. On the contrary, where the subject matter jurisdiction of special courts for alleged terrorists "is not based on objective criteria but on the nationality of the suspected terrorists," the result is "discrimination based on nationality."[51]

Trial before a civil court with full judicial safeguards is not a right that may be afforded only to citizens. Under

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art. 16. Protocol I, *supra* note 10, states that "fundamental guarantees" must be provided "without any adverse distinction based upon . . . national origin . . . ." Art. 75.1.

[49] U.N. H.R. Committee *General Comment No. 18: Non-discrimination*, (Nov. 10, 1989), para. 13. The United States interprets articles 2.1 and 26 to permit distinctions "when such distinctions are, at minimum, rationally related to a legitimate governmental objective." 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), Understanding II(1). It is not clear that this test differs from the "reasonable and objective" language used by the Committee. In any event, neither the President's Military Order nor logic explains why trying foreign but not American members of al Qaeda by military commission is "rationally related" to the legitimate objective of countering international terrorism.

[50] Presidential Military Order, *supra* note 18, §§ 1(e) and (f).

[51] U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) para. 67, *available at* http://www.ohchr.org/english/issues/detention/annual.htm (last visited Jan. 3, 2006).

ICCPR article 14.1, "[a]ll persons shall be equal before the courts and tribunals," and article 14.3 requires that each of its fair trial provisions must be provided "in full equality." The HRC elaborates: "Aliens shall be equal before the courts and tribunals .... Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights."[52]

A 2004 judgment of Britain's highest court confirms that the ICCPR prohibits discrimination against suspected terrorists who happen to be foreign nationals.[53] The Law Lords considered a British law which permitted prolonged detention without trial of suspected terrorists, but only if they were foreign nationals awaiting deportation, not British citizens.[54] The Lords ruled by an 8-1 vote that the law was "incompatible" with the European Convention on Human Rights ("ECHR"), as both disproportionate and discriminatory.[55] In an opinion endorsed by the clear majority, Lord Bingham ruled that article 14 of the ECHR and article 26 of the ICCPR, which Britain's Attorney General conceded are "to the same effect," are "inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency."[56]

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[52] *General Comment 15*, *supra* note 47, para. 7.

[53] *A(FC) and others (FC) v. Secretary of State*, and *X (FC) and another (FC) v. Secretary of State*, House of Lords, [2004] UKHL 56 (U.K.) accessible in LEXIS International Law Library, Cases file (last visited Jan. 3, 2006).

[54] *Id.* paras. 2, 3, 12, 14 and 46.

[55] *Id.* at 73 (Lord Bingham), 85 (Lord Nicholls), 139 (Lord Hope), 160 (Lord Scott), 190 (Lord Rodger), 234-39 (Baroness Hale), 240 (Lord Carswell). Lord Hoffman joined in the judgment on the separate ground that there was no emergency sufficient to justify Britain's derogation from the right to liberty. *Id.* at 50-53.

[56] *Id.* para. 63; *see also* paras. 73, 76, 136 and 139.

International humanitarian law likewise prohibits discrimination in trial procedures for foreign citizens. GC III grants foreign prisoners of war the right to trial before the "same courts" using the "same procedures" as apply to soldiers of the Detaining Power.[57] And the fundamental guarantees of article 75 of Protocol I must be provided "without any adverse distinction" based upon, among other grounds, "other status, or on any other similar criteria."[58] This prohibition of discrimination based on "other status" includes discrimination based on nationality.[59]

The use of military commissions exclusively against foreign nationals such as petitioner Hamdan, then, discriminates in violation of international humanitarian and human rights law, and thus also exceeds any authority under the statutes, as interpreted in light of minimum international standards.

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[57] GC III, *supra* note 6, art. 102.

[58] *Id.* art. 75.1.

[59] *See Gueye v. France*, U.N. H.R. Committee, Comm. No. 196/1985, Decision of the Human Rights Committee, 6 April 1989, CCPR/C/35/D/196/1985, para. 9.4 (nationality discrimination constitutes discrimination based on "other status" under art. 26 of the ICCPR); *A v. Sec'y of State*, House of Lords, note 53 *supra*, at para. 49 (Attorney General accepted that "other status" includes immigration status). *See also* Inter.-Am. C.H.R., Adv. Op. OC-18, *Juridicial Condition and the Rights of Undocumented Migrants* (2003), paras. 110 (principle of non-discrimination is *jus cogens*) and 121 (due process must be guaranteed to all without discrimination based on migratory status).

3. The Military Commission Procedures Impermissibly Deny Access to Secret Trial Proceedings and Documents.

(a) Exclusion from Secret Hearings Violates Petitioner Hamdan's Rights to Be Tried in His Own Presence and to Assistance of Counsel.

The procedures of the Hamdan military commission permit the exclusion of the accused from portions of his own trial. While generally the accused may be present at every stage of the trial, his presence must be "consistent with Section 6(B)(3)."[60] That section authorizes the commission's presiding officer – or the Appointing Authority – to close proceedings. Closure may be for such purposes as protecting classified information or intelligence sources, methods or activities, or "other national security interests." And it "may include a decision to exclude the Accused, [and] Civilian Defense Counsel . . . ."[61]

Such exclusion violates petitioner Hamdan's right under international humanitarian and human rights law "[t]o be tried in his presence . . . ."[62] The International Committee of the Red Cross ("ICRC") Commentary explains that "the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts,

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[60] MCO No. 1, *supra* note 25, § 5(K).

[61] *Id.* § 6(B)(3).

[62] ICCPR, *supra* note 3, art. 14.3 (d). Accord, Protocol I, *supra* note 10, art. 75.4 (e): "Anyone charged with an offense shall have the right to be tried in his presence." This includes, at minimum, all hearings in which the prosecutor participates. *E.g. Belziuk v. Poland*, App. No. 00023103/93, Eur. Ct. H.R. (Mar. 25, 1998) para. 39, *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=3675449&skin=hudoc-en (last visited Jan. 3, 2006).

to ask questions himself and to make his objections or propose corrections."[63]

By allowing prosecutors to present and argue secret evidence in the absence of the accused and civilian defense counsel, the military commission procedures breach not only this "important" element of the right to be tried in one's presence, but also the right to assistance of counsel under ICCPR article 14.3(d). Even though military defense counsel may be present at all sessions of the trial, this fails to cure the violation, because military counsel "may not disclose any information presented during a closed session to individuals [such as the accused and civilian defense counsel] excluded from such proceeding."[64]

The statute authorizing the President to prescribe procedures for military commissions, 10 U.S.C. § 836(a), can, and therefore must, be construed to require procedures that meet these minimum international standards for trial in one's presence and to assistance of counsel. Thus the procedures for the commission trial of petitioner Hamdan violate the statute.

(b) Denial of Access to Secret Documents Violates Petitioner Hamdan's Rights to Adequate Facilities for the Defense and to Equality of Arms.

The military commission procedures deny the accused and his counsel access to documents containing "protected information" – broadly defined – even if that evidence would be exculpatory. While the prosecution is directed to provide the defense with access to evidence that the prosecution intends to introduce at trial, as well as other evidence known to the prosecution that tends to exculpate

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[63] Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August* 1949 (Yves Sandoz et al. eds., International Committee of the Red Cross, 1987), art. 75, para. 3110.

[64] MCO No. 1, *supra* note 25, § 6(B)(3).

the accused, there are caveats to these requirements that substantially undercut them.[65] Such access is only to be granted where it is consistent with subsequent provisions relating to broadly defined "protected information."[66]

With respect to evidence the prosecution intends to introduce, the Presiding Officer may direct the deletion of "protected information" from documents before they are made available to the accused and his military and civilian defense counsel, "or" the substitution of either a "portion or summary" of the information or a statement of the facts that the omitted information tends to prove.[67] But even where a deletion is accompanied by a substitution, it is no cure, since neither the accused nor his counsel has any way to know whether the substitute fairly and adequately compensates for the denial of access to the original.

The accused and his civilian defense counsel are further excluded from access to protected information. Although military defense counsel must have some access to protected information actually admitted into evidence, at least through the kind of substitutes described above, neither the accused nor his civilian counsel are guaranteed even that much.[68]

With respect to exculpatory evidence – evidence the accused could use to demonstrate his innocence – the denial of access is even more severe. So long as the prosecution does not intend to introduce the evidence at trial, the prosecution is not required, and indeed is not allowed, to disclose to the accused or his counsel any protected

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[65] *Id.* § 5(E).

[66] This includes information which is "classified or classifiable;" or which is protected from disclosure by "law or rule;" or whose disclosure "may" endanger witnesses or participants in commission trials; or which concerns "intelligence and law enforcement sources, methods, or activities;" or which concerns "other national security interests." *Id.* § 6(D)(5)(a). *See also id.* § 9 (no unauthorized disclosure of "state secrets").

[67] MCO No. 1, *supra* note 25, § 6(D)(5)(b).

[68] *Id.*

information, *even if* that information is of an exculpatory character.[69] The defense thus may never learn of the existence of critical exculpatory information.

For these reasons, permitting the denial of "protected" information to the defense violates the right of petitioner Hamdan under both international human rights and humanitarian law to "adequate . . . facilities for the preparation of his defense"[70] and to equality of arms. The statute can and must be construed consistent with these international rights. Petitioner Hamdan's commission trial procedures therefore violate 10 U.S.C. § 836(a).

II. *Eisentrager* Does Not Foreclose Judicial Enforcement of the 1949 Third Geneva Convention.

Relying on a footnote in this Court's 1950 decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the court below concluded that *Eisentrager* forecloses any judicial enforcement of GC III.[71] In so doing, the Court of Appeals ignored both the full text of *Eisentrager* and the most relevant differences between the 1929 Geneva Convention ("1929 GC")[72] at issue in *Eisentrager* and the 1949 GC III at issue here. As we shall show, notwithstanding the footnote relied on by the Court of Appeals, the *Eisentrager* Court *did* consider on the merits the prisoners' claims that

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[69] *Id.* §§ 5(E), 6(D)(5)(b).

[70] ICCPR, *supra* note 3, art. 14.3(b). The Human Rights Committee explains that the "facilities must include access to documents and other evidence which the accused requires to prepare his case . . . ." *General Comment 13, supra* note 24, para. 9. *See also* GC III art. 105 (right to "necessary facilities to prepare the defense"); Protocol I art. 75.4(a) (right to "all necessary rights and means of defense").

[71] The Court of Appeals refers to the Geneva Convention Relative to the Treatment of Prisoners of War as the "1949 Geneva Convention." *See Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C.Cir 2005). This is the same Convention referred to herein as "GC III." *See* note 6 *infra*.

[72] Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 ("1929 GC").

the military commission lacked jurisdiction to try them because of violations of the 1929 GC. Those claims were rejected not because that treaty was unenforceable in court, but because its provisions did not apply to trials for offenses committed by a POW prior to capture – a gap in protection that was expressly cured by article 85 of the 1949 GC III. Moreover, whatever may have been true with respect to the 1929 GC, enforcement of GC III is not – by its terms and by its construction in international law – limited to diplomatic and military means. This Court therefore should enforce petitioner Hamdan's rights and the United States' solemn obligations under GC III.

A. *Eisentrager* Itself Demonstrates That a Court Can Consider a Geneva Convention Challenge to the Jurisdiction of a Military Commission.

A full reading of *Eisentrager* belies the Court of Appeals' conclusion that courts cannot consider GC III challenges to the jurisdiction of a military commission. The issue arose in *Eisentrager* because the prisoners had, *inter alia*, invoked the 1929 GC in challenging the jurisdiction of the military commission that had tried and convicted them for war crimes. Specifically, the prisoners argued that the military commission lacked jurisdiction because certain safeguards guaranteed by the 1929 GC had not been observed. *Johnson v. Eisentrager*, 339 U.S. 763, 789-90 (1950). Before addressing these challenges, this Court opened its consideration of the 1929 GC with the initial observation that the prisoners neither had, nor could have, asserted that anything in the 1929 GC made them "immune from prosecution or punishment for war crimes." *Id.* at 789. To this unassailable observation the Court attached the footnote upon which the Court of Appeals relied.

That footnote statement – which must be termed *dictum* – was as broad as the preceding statement had been uncontroversial. "We are not holding," this Court

stated, "that these prisoners have no right which the military authorities are bound to respect." *Id.* at 789 n.14. Rather, this Court continued, the prisoners were entitled to the protections of the 1929 GC. *Id.* Without specifying what those protections might be, the Court declared in general terms that it was "the obvious scheme" of the 1929 GC that "responsibility for the observance and enforcement of these rights is upon political and military authorities," and that "[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers . . . ." *Id.*

But what is significant about *Eisentrager* is that this footnote did *not* terminate the Court's discussion of the 1929 GC claims. Quite to the contrary, this Court proceeded to address, *on the merits*, the prisoners' claims that the military commission lacked jurisdiction to try them because guarantees afforded by the 1929 GC had been ignored. *Id.* at 789-90. While the Court in the end ruled against the *Eisentrager* prisoners with respect to their 1929 GC claims, it did so *not* because it lacked jurisdiction to consider those claims, but because the protections asserted by the prisoners did not – under the 1929 GC – apply to trials for war crimes allegedly committed by a prisoner of war prior to his capture. *Id.*

Taken as a whole, therefore, *Eisentrager* cannot be taken to foreclose judicial consideration of whether trial by military commission violates rights guaranteed by GC III. Had the *Eisentrager* footnote been meant to be as broad and dispositive as the Court of Appeals now reads it, that footnote would have ended the matter, and no further discussion of the 1929 GC claims would have ensued. The fact that the *Eisentrager* Court itself went on to address the merits of the prisoners' Geneva Convention claims demonstrates that those claims are not beyond the reach of American courts.

B. Neither of *Eisentrager's* Reasons for Rejecting Challenges Based on the 1929 GC Apply to Petitioner Hamdan's Challenge Based on the Materially Different 1949 GC III.

One of the two Geneva Convention claims raised by the *Eisentrager* prisoners was that their trial by military commission violated their right under article 63 of the 1929 GC to be tried only "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." *Id.* at 790. This, of course, is the same as petitioner Hamdan's claim that trial by military commission would violate his right under article 102 of GC III to be tried by the same courts and according to the same procedures as would apply to U.S. military personnel.

But while the *Eisentrager* prisoners lost on this claim, petitioner Hamdan should prevail, since neither of this Court's reasons for rejecting the *Eisentrager* claim remain applicable. The *Eisentrager* Court first observed that "no prejudicial disparity is pointed out as between the Commission that tried prisoners and those that would try an offending soldier of the American forces of like rank." *Id.* But this clearly is no longer the case; petitioner Hamdan has pointed to many respects in which his trial by military commission would deny him critical fair trial rights guaranteed to American service members.[73]

The *Eisentrager* Court's second reason for rejecting the Geneva Convention claims is equally inapplicable now. That Court held that under the 1929 GC, the article 63 right to be tried by the same courts and procedures applicable to soldiers of the detaining power applied only to trials for offenses committed during captivity, not for offenses such as war crimes committed prior to capture.

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[73] For example, under the U.C.M.J., *supra* note 46 at § 839 art. 39, an American soldier is guaranteed the right to be present throughout his trial, a right not guaranteed under the military commission procedures, *see infra* at 19-20.

Eisentrager, 339 U.S. at 790. But the 1949 GC III expressly changed this. Article 85 of GC III assures the "benefits of the present Convention" to prisoners of war prosecuted "for acts committed prior to capture."[74] The ICRC Commentary to article 85 makes it clear that this provision was added to assure fair trial rights for individuals accused of war crimes committed prior to their capture.[75] Hence, unlike the *Eisentrager* prisoners, petitioner Hamdan is entitled under the current Geneva Convention to trial by the same courts, according to the same procedures, as would be applicable to members of the U.S. armed forces.

C. Whatever the Enforceability of the 1929 GC, the Materially Different Terms of the 1949 GC III, Combined with Post-WWII Developments in International Law, Confirm That GC III Is Judicially Enforceable.

Even if one were to give the *Eisentrager* footnote the sweeping construction urged by the court below – a construction that we have shown is belied by the *Eisentrager* Court's own consideration of the 1929 GC claims – the Court of Appeals' analysis is faulty for another critical reason. The text of the 1949 GC III, as well as developments in international law since World War II, demonstrate that whatever may have been true in 1929, enforcement of GC III and the other 1949 Geneva Conventions is not limited to diplomatic protest or intervention.

In reaching its conclusion that GC III, like its 1929 predecessor, was enforceable only by political and military authorities, and not judicial ones, the Court of Appeals

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[74] GC III, *supra* note 6, art 85. *See also* Howard S. Levie, *Prisoners of War in International Armed Conflict*, in INTERNATIONAL LAW STUDIES VOLUME 59, 380-81 n.174 (Naval War College Press) (1978).

[75] International Committee of the Red Cross, *Commentary to Article 85, available at* http://www.icrc.org/ihl.nsf/com/375-590104?OpenDocument (last visited Jan. 3, 2006).

overlooked a key provision of the 1949 GC III. New article 5 – which the Court of Appeals discusses elsewhere, but not in this context or in comparing the 1929 GC with GC III – expressly confers judicially enforceable rights on alien enemies. It provides that in cases of doubt, their status must be determined by a "competent tribunal."[76] In other words, GC III expressly provides a judicial remedy. The *Eisentrager* footnote, resting on the exclusively diplomatic remedies of the 1929 GC, no longer applies to the 1949 GC III. *Eisentrager's* interpretation of the 1929 Convention does not, therefore, justify denial of judicial enforcement of the new rights conferred by GC III.

Reliance on the *Eisentrager* footnote likewise overlooks critical developments in international law regarding the enforcement of the 1949 Geneva Conventions. This oversight is of particular importance because the *Eisentrager* footnote purports to be rooted in international law. The footnote offers no analysis of any affirmative restraints on judicial enforcement of treaty rights imposed by U.S. domestic law. Rather, it reaches its conclusion that the 1929 GC was enforceable only by diplomatic or military means *solely* by reference to an international source – *i.e.*, the "obvious scheme" for enforcement contained within the four corners of the 1929 GC itself. *See Eisentrager*, 339 U.S. at 789 n.14. The Court of Appeals did the same. Because GC III, like its 1929 predecessor, provides for dispute resolution procedures between governments regarding compliance issues, the Court of Appeals concluded, *essentially as a matter of international law*, that GC III is not judicially enforceable, and that the sole remedy for non-compliance under the terms of GC III is through political and military authorities.

The experience of the international and hybrid criminal tribunals established since 1993 precludes the conclusion that, as a matter of international law, the 1949

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[76] GC III, *supra* note 6 at art. 5.

Geneva Conventions are not judicially enforceable.[77] For the past decade, the ICTY has been enforcing GC III and the 1949 Fourth Geneva Convention in cases concerning the prosecution of alleged perpetrators of war crimes during the Balkan conflict of the early 1990's.[78] The ICTR has been enforcing Common article 3 to the 1949 Geneva Conventions and the 1977 Additional Protocol II relating to non-international conflicts in connection with the genocide in Rwanda in 1994.[79] Thus, questions regarding the applicability of the 1949 Geneva Conventions in the context of international and non-international armed conflicts and the enforcement of the grave breaches provisions and Common Article 3 have been intensively examined and ruled upon by the ICTY and the ICTR.

It would come as a great surprise to the judges of the ICTY and ICTR and of the other tribunals to be informed that the 1949 Geneva Conventions cannot be judicially

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[77] The international and hybrid criminal tribunals which include as part of their subject matter jurisdiction for the prosecution of individual perpetrators the grave breaches of the 1949 Geneva Conventions and/or serious violations of Common Article 3 of the 1949 Geneva Conventions are the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Iraqi High Criminal Court, the special war crimes courts in East Timor and Kosovo, and the International Criminal Court.

[78] *See, e.g., Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34 (Trial Chamber), March 31, 2003, paras. 176-223 and 245-770, *available* at www.un.org/icty/naletilic/trialc/judgement/index.htm; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001, paras. 36-160, 238-256, 273-291, 329-347, 832-837, Annex V *available at* www.un.org/icty/kordic/trialc/judgement/index.htm; *Prosecutor v. Kunarac, Kovac and Vokovic*, Case No. IT-96-23 and IT-96-23/1I (Trial Chamber), February 22, 2001, paras. 405-409, 492, 883-889, *available at* www.un.org/icty/kunarac/trialc2/judgement/index.htm.

[79] *See, e.g., Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-T (Trial Chamber), May 21, 1999, paras. 155-189, 590-624, *available at* http://65.18.216.88/default.htm; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3 (Trial Chamber), December 6, 1999, paras. 85-119, 434-445 *available at* http://65.18.216.88/default.htm.

enforced. If the Court of Appeals' view – that the 1949 Geneva Conventions by their very terms are unenforceable in courts of law – were to be sustained, then the ICTY and ICTR have been acting *ultra vires* in prosecuting and convicting numerous individuals for war crimes violating the 1949 Geneva Conventions.

As a permanent member of the U.N. Security Council, the U.S. voted for, and indeed played a lead role in, the establishment of the ICTY and the ICTR with jurisdiction over war crimes, particularly those identified in the 1949 Geneva Conventions. The U.S. has been the strongest supporter of (and the largest financial contributor to) the ICTY and the ICTR, and has never questioned the tribunals' jurisdiction to enforce the 1949 Geneva Conventions. Indeed, the U.S. has been instrumental in pursuing the apprehension of ICTY and ICTR indictees and their prosecution before the relevant tribunal, and has enacted legislation for the very purpose of facilitating this enforcement of the 1949 Geneva Conventions in these courts of law.[80]

These developments in international law underscore the error in the Court of Appeals' analysis. Whatever may have been the case in 1929, it most certainly cannot now be said that international law contemplates only diplomatic, and not judicial, enforcement of the 1949 Geneva Conventions, including GC III.

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[80] *See, e.g.*, Pub. L. No. 104-106, 110 Stat. 486, § 1342 (1996), which provides statutory authority for the transfer of indictees from U.S. custody to the ICTY or ICTR.

CONCLUSION

Amici urge this Court to reverse the decision of the Court of Appeals.

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